IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 16446 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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NALINBHAI RANCHHODJI DESAI AND ANOTHER
Versus
HASMUKHBHAI MAGANBHAI DESAI AND OTHERS

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Appearance :
MR CL SONI for the Petitioners
MR NK MAJMUDAR for the Respondents

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CORAM : HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

Date : 09/10/2007

ORAL JUDGMENT

1. Mr.C.L.Soni, learned advocate for the petitioners, seeks permission to delete respondent No.6. Permission is granted.

2. **RULE**. Mr.N.K.Majmudar, learned advocate, waives service of Rule on behalf of the respondents.

3. Heard Mr.C.L.Soni, learned advocate for the petitioners, who submitted that the application was filed under Section 5 of the Mamlatdars' Court Act on 04.05.2005. The first date of hearing was on 30.05.2005. Learned advocate Mr.Soni submitted that the Mamlatdar relied upon a Panchnama dated 06.06.2005, which is produced at page No.84 to the petition.

Mr.Soni, learned advocate for the petitioners, pointed out that the Panchnama wrongly records a fact that both the Panchas are residents of village 'Shedhav', whereas in the same Panchnama, Panch No.1 is shown to be resident of village “Vadala'. He submitted that what is stated in the Panchnama is that right of way, according to the knowledge of the Panchas, is existing since time immemorial ('parapurvathi') and that the said way is used by the owners to the knowledge of the Panchas.

Mr.Soni, learned advocate for the petitioners, rightly pointed out that the Panchnama, though stated to have been drawn in presence of the parties, as mentioned in the order of the Mamlatdar, the Panchnama does not bear the signature of the either party.

4. Mr.N.K.Majmudar, learned advocate for the respondents, submitted that parties were present, but then he is not able to explain as to why signatures of the parties were not obtained on the Panchnama. Learned advocate Mr.Majmudar is not able to dislodge

the submissions of learned advocate Mr.Soni.

The order of the Mamlatdar, in specific words, records that the site inspection was carried out in presence of the parties and also in presence of the Panchas on 06.06.2005 and the statement of the Panchas were recorded, but then the Panchnama does not bear the signature of either party. This is sufficient to dislodge the order of the Mamlatdar.

5. Besides, Mr.Soni, learned advocate for the petitioners, submitted that the right of way, if claimed as an easementary right, it is required to be established in a Civil Court of competent jurisdiction. He submitted that Mamlatdar has no jurisdiction to to decide the right of way, more particularly when it is claimed as an easementary right.

The aforesaid submission of learned advocate Mr.Soni is controverted by Mr.N.K.Majmudar, learned advocate for the respondents.

6. In view of the aforesaid discussion, judgment and order 30.07.2005 passed by the Mamlatdar in Mamlatdars' Court Act Suit No.3 of 2005, which was confirmed by the Deputy Collector in Mamlatdars' Court Revision Case No.1 of 2005 by judgment and order dated 12.03.2007 are quashed and set aside. The matter is remanded to the Mamlatdar to decide the same afresh, after giving proper opportunity to both the parties. The Mamlatdar shall decide

the matter afresh without being influenced by the fact that present petition is allowed and the order of the Mamlatdar and that of the Deputy Collector are quashed and set aside.

7. The petition is allowed to the aforesaid extent. Rule is made absolute. No costs. Direct service is permitted.

(RAVI R.TRIPATHI, J.)

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